

No. 21,691 ✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RUDY L. NOTARO,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the District of Nevada

APPELLEE'S ANSWERING BRIEF

JOSEPH L. WARD,

United States Attorney,

ROBERT S. LINNELL,

Assistant United States Attorney,

305 Post Office Building,

Las Vegas, Nevada,

Attorneys for Appellee.

FILED

JUL 17 1967

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I. STATEMENT OF JURISDICTIONAL FACTS

The indictment herein charged a violation of Title 21, United States Code, Section 176(a), in a single count, an offense against the United States.

Under Title 18, United States Code, Section 3231, United States District Court had original jurisdiction. Upon the Court's verdict of guilty, Appellant was sentenced. It is conceded that this Court has jurisdiction over appeals from such final decisions of a District Court, pursuant to the provisions of Title 28, United States Code, Section 1921, and by virtue of Rule 27(a) of the Federal Rules of Criminal Procedure.

II. STATEMENT OF THE CASE

This is an appeal from the conviction of the Appellant, Rudy L. Notaro, in the United States District Court for the District of Nevada. The indictment upon which the conviction is based charged Appellant with receiving, concealing, selling, and facilitating the transportation, concealment and sale, of approximately three and one-half ounces of marijuana on or about September 9, 1964 (R.05).¹

Appellant had previously been tried on the same indictment, convicted by a jury, and prosecuted an appeal to this Court contending (1) that there was an illegal entrapment and (2) that the trial court erroneously instructed the jury.

This Court determined in connection with that appeal (1) that the jury's determination of the absence of illegal entrapment should not be disturbed and (2) that the jury was erroneously instructed as to the law, and the conviction was reversed and the matter remanded for a new trial. *Notaro v. United States*, 9 Cir., 1966, 363 F.2d 169.

In prosecuting the present appeal, Appellant has specified as error that he should have been acquitted by reason of an unlawful entrapment (Opening Brief, page 6).

At the second trial, Appellant having waived trial by a jury (R.74), the case was tried to the Court. The evidence presented to the Court, when examined in the light most favorable to the Appellee (*Glasser v. United*

¹"R" as used herein refers to the Record on Appeal.

States, 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457 (1941); *Kaplan v. United States*, 9 Cir., 1964, 329 F.2d 561), establishes that an unpaid informant, Harry Midby, had been acquainted with Appellant for several months (T.7)² and that in early September, 1964, he met the Appellant at a restaurant, where the conversation involved marijuana (T.8). Appellant had informed Mr. Midby that he was going into the business of peddling marijuana (T.12), whereupon Midby contacted Detective Albright, of the Clark County Sheriff's Office, who, in turn, introduced the informant to Federal Narcotics Agent Richard Salmi (T.13).

The informant, Midby, told Appellant that he had a friend from out of state that wanted to buy marijuana, and Appellant indicated that he should bring his friend to the Appellant's house late in the afternoon (T.14). On the afternoon of September 9, 1964, the informant accompanied Agent Salmi to Appellant's home where the informant left the car, entered the house and received a small portion of marijuana from the Appellant. Midby showed the sample to Agent Salmi, who had remained outside the residence, and thereafter Appellant indicated that it would be all right for Midby to bring Mr. Salmi into the house. Upon entering, Agent Salmi weighed additional marijuana and after some discussion as to price, purchased, in Midby's presence, several packages of marijuana (Exhibit 4) from the Appellant for \$80.00 (T. 15-18).

²"T" as used herein refers to the Reporter's Transcript of the Trial Proceedings of December 19, 1966.

Agent Salmi testified that Appellant had wanted \$100.00 for the marijuana, but that Appellant finally agreed to accept \$80.00 (T.78,79). Salmi further testified that Appellant told him that he was expecting additional narcotics from Mexico and would later be able to sell him pound quantities (T.79,80).

Appellant testified that he had seen the informant, Midby, at the former's place of work on numerous occasions prior to September of 1964, and that informant had asked him for marijuana (T.126-128); that on each occasion he told the informant that he would not get involved with marijuana (T.130). Further, Appellant denied giving Midby a sample of marijuana to take out to the customer (T.134), and testified that when Agent Salmi and Midby entered his bedroom there was some marijuana on the dresser, but that he did not know how it got there (T.135,143). Appellant admitted, however, that he accepted \$80.00 for this marijuana (T.135).

The Court judged the Appellant to be guilty, and specifically determined that on September 9, 1964, Appellant sold marijuana to Agent Salmi. Further, the Court specifically determined that there was no unlawful entrapment, the thought of selling marijuana having originated with the Appellant. The Court gave no credit whatsoever to Appellant's own testimony (T.151-153).

III. SUMMARY OF ARGUMENT

There was no unlawful entrapment of the Appellant as a matter of law.

IV. ARGUMENT

THERE WAS NO UNLAWFUL ENTRAPMENT OF THE APPELLANT AS A MATTER OF LAW.

The lower Court determined, as to Appellant's defense of entrapment, as follows (T.151-153):

“With respect to the defense of entrapment, which is properly raised in this case, that time element is important, and it is also important that the Court should judge the credibility of the two principal witnesses on that point, Mr. Midby and Mr. Notaro.

“Mr. Midby's testimony was clearly to the effect that the suggestion of engaging in the business of selling narcotics first came from Mr. Notaro. Mr. Notaro, on the other hand, would have us believe that he had no idea whatsoever of trafficking in marijuana until Mr. Midby persuaded him to do so. Whether or not that testimony is true depends on which witness the Court credits, and in view of the testimony of Mr. Notaro that he did not have anything to do with this three and a half ounces of marijuana, didn't have it in his possession, didn't know how it came to be on the dresser in his own bedroom, as opposed to the testimony of Agent Salmi and Detective Albright and Mr. Midby with respect to the precautions that were taken for assurance that Mr. Midby did not have the marijuana in his possession when he entered the house and the bedroom, I just can't believe Mr. Notaro's story.

“If I don’t believe that part of it, there is no reason why I should believe his testimony that he had no intention whatsoever of trafficking in marijuana, but that he was induced and persuaded to do so by the informer.

“I think that Mr. Notaro’s testimony was discredited on a very material point, and that it was the result of a wilful falsehood on his part. For that reason, I do not give credit to any of his testimony.”

The factual and legal issues are substantially as reviewed by this Court in *Notaro v. United States*, 9 Cir. 1966, 363 F.2d 169. In discussing the apparent finding of the jury between the testimony of Mr. Notaro and Mr. Midby, the Court there stated (363 F.2d 173):

“The credibility of each was put in question, and their demeanor and attitude, not observable to us here, was subject to scrutiny by both the judge and jury. When, as here, the result of the trial was so dependent upon the conflicting testimony of two witnesses and when the trial judge refused to disturb the jury’s determination in spite of his own expressed leaning toward an opposite conclusion, we cannot bring ourselves to interfere.”

It is Appellee’s position that the same reasoning applies to the present appeal. On similar, if not identical facts, the trial judge made a determination after judging the testimony of each witness. There was evidence upon which to base his determination, and that determination ought not to be disturbed.

V. CONCLUSION

Based upon the entire record herein and the foregoing arguments, it is the position of the Appellee that the judgment of the District Court should not be disturbed.

Dated, Las Vegas, Nevada,
July 8, 1967.

Respectfully submitted,

JOSEPH L. WARD,

United States Attorney,

ROBERT S. LINNELL,

Assistant United States Attorney,

Attorneys for Appellee.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT S. LINNELL,

Assistant United States Attorney,

Attorney for Appellee.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RALPH RICHARD BENSON,

Appellant,

vs.

LELAND C. CARTER, Probation Officer
of Los Angeles County, PEOPLE OF THE
STATE OF CALIFORNIA,

Appellees.

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NO. 21693

See Vol. 3402

JUN 24 1968

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF AMERICA

APPELLANT'S PETITION FOR REHEARING

RALPH R. BENSON
1680 North Vine Street
Hollywood, California 90
466-7221

DATED: June 14, 1968

Attorney for Himself-
Appellant

FILED
JUN 17 1968

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RALPH RICHARD BENSON,)	
)	
Appellant,)	NO. 21693
)	
vs.)	
)	
LELAND C. CARTER, Probation Officer)	
of Los Angeles County, PEOPLE OF THE)	
STATE OF CALIFORNIA,)	
)	
Appellees.)	
)	
)	

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

- - -

APPELLANT'S PETITION FOR REHEARING

TO THE HONORABLE CIRCUIT JUDGES: HAMLEY, KOELSCH and ELY:

Appellant RALPH RICHARD BENSON hereby petitions for a rehearing by this panel or a rehearing en banc to reconsider the judgment entered in this action on May 17, 1968, on the following grounds:

I.

The Ninth Circuit failed to see the constitutional basis of the state Perez decision when it edited a portion of the Perez case (which followed the Supreme Court of the United States ruling in Morrison v. California): "To compel a defendant to admit guilt as a condition to invoking the defense of entrapment would compel him to relieve the prosecution of proving his guilt beyond a reasonable doubt..."

II.

The Ninth Circuit stated that the defense of entrapment in California is based solely on an election of the courts preserving their own purity under supervisory powers, quoting the Benford case. The Ninth Circuit fails to give meaning to the words of the Perez case which said that guilt or innocence of a person entrapped is involved when the disclosure of the informant was "relevant and helpful to the defense of the accused or essential to a fair determination of the cause...when the informer is a material witness on the issue of guilt...and his testimony might have disclosed an entrapment."

III.

The Ninth Circuit refers to the concurring opinions in Sorrells and Sherman. These opinions cannot undermine the majority opinion in the cases which base the defense of entrapment on innocence of the accused which he has a right to be protected under a plea of not guilty. No state or federal court can so undermine, limit or fetter this defense. They cannot overrule a decision of the Supreme Court of the United States.

IV.

The Ninth Circuit states that Benson was not denied due process by his state because California required "an admission of the acts charged. This is incorrect. The law as applied to Benson went further: it required plea of guilty to all three offenses charged citing Benson's: "consistent denial that the crimes complained of were committed."

V.

The Ninth Circuit states that due process was satisfied by a trial on a defense of lack of scienter although the defense of entrapment was neither heard nor tried (nor waived). This argument is contrary to Hall v

Illinois since the Ninth Circuit now permits fettering and destruction of the defense of entrapment while unconstitutionally permitting a state to elect defenses for an accused and by such election permits a conviction without a trial of an accused by entrapment and frame-up by publicly paid servants and enforcers of the law who went beyond affording an opportunity to commit a crime but lured and deceived the accused and manufactured a crime of their own by their conversations, acts and letters.

VI.

The Ninth Circuit states that the District Court of Appeal held that Benson "denied the acts charged." This is untrue. The record shows that Benson admitted the acts of forwarding the insurance claims. He denied believing the claims were false.

VII.

The Ninth Circuit cites Cox v. Louisiana and Raley v. Ohio yet incorrectly finds these cases do not apply where a state agent without his badge showing makes the same false representations to a person later accused of crime which was manufactured by that state servant. A person has a constitutional right not to be framed, and have his defense of entrapment and frame-up heard in open court whether the policeman had his uniform on or off at the time of the incident.

VIII.

The Ninth Circuit states Benson is on parole. It is untrue. He is on probation.

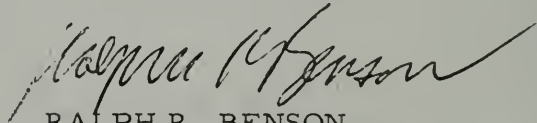
IX

Any state or federal decision which extracts an admission of an act or an admission of the commission of the offense charged as a special

price for having the courts open to a determination of public servants manufacturing a crime so an honest citizen can be put in jail should be stricken down. Any conviction so obtained should be retroactive because justice and a fair trial and the Constitution have been denied and disgrace to an innocent person.

DATED: June 14, 1968.

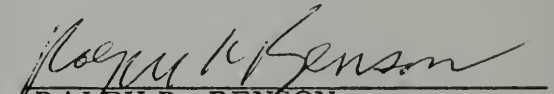
Respectfully submitted,

A handwritten signature in cursive script, reading "Ralph R. Benson". The signature is written in dark ink and is positioned above the printed name and title.

RALPH R. BENSON
Attorney for Himself-Appellant

CERTIFICATE

Pursuant to Rule 23, I certify that in my judgment the .
foregoing Appellant's Petition for Rehearing is well founded
and that it is not interposed for delay.



RALPH R. BENSON
Attorney for Himself-Appellant

